KHENG SOON FINANCE BHD v. M.K. RETNAM HOLDINGS SDN. BHD. & ORS.

[F.C. (Salleh Abas C.J. (Malaya), Mohamed Azmi & Syed Agil Barakbah F.JJ.) July 5 & August 4, 1983]
[Kuala Lumpur – Federal Court Civil Appeal No. 281 of 1983]

Land Law – Charge of land – Application to sell land charged – Cause to the contrary shown – Failure to pay instalments of loans – Unreasonable attitude of chargee – Right of third parties – National Land Code, s. 256(3).

Contract – Sale of Land – Housing development – Charge of land to finance company – Equity of purchasers of building lots.

In this case the first respondent was a housing developer and developed a housing estate, consisting of 59 building lots owned by it. Houses were built on the lots for sale to members of the parties. Sale and purchase agreements were made with the purchasers under which it was stipulated that the vendor could subject the land to encumbrances after the signing of the agreement but the land sold should be free from encumbrances prior to the handing over of vacant possession of the building to the purchaser. Among those who bought the houses were the second respondent. To finance the development, the first respondent obtained a loan from the appellant as bridging finance. As security for the loan the first respondent charged all the 59 housing lots to the appellant. According to the arrangement, the loan was to be released by stages; the first release of $200,000.00 to be made upon presentation of the charge; and subsequent releases regarding the balance of $400,000.00 to be made progressively upon presentation of the first respondent's architect's certificates. The loan was subject to 11% interest per annum which was to be calculated and settled monthly. Subsequently the first respondent delayed payment of interest for several months, whereupon the appellant refused to make further loan releases unless interest was paid despite the fact that architect's certificates were presented. Because of financial difficulties which the first respondent attributed to the appellant's failure to honour its loan obligations to make loan releases, the first respondent's contractors ceased work and the development of the estate was as a result adversely affected. The appellant applied for an order of sale of the first respondent's land. The second respondent applied to intervene in the application. The learned trial judge refused the appellant's application and allowed the application of the second respondent to intervene. The learned trial judge held that the charge was unenforceable because the sale and purchase agreement made by the first respondent with the purchasers of the lots did not allow the first respondent to create the charge but only such encumbrances as would not place the land in jeopardy of being sold, because otherwise the purchasers would not be entitled to vacant possession free of encumbrances which they were entitled to under the agreement. As alternative ground the learned judge held that the loan was extended and that being the case the appellant should not be entitled to the foreclosure. The appellant appealed.

Held: (1) even assuming the learned judge's view that the sale agreement prohibited the creating of the charge was correct, the charge created in breach of the agreement could not render it invalid, unless fraud is proved, the reason being that the appellant was not a party to the Sale and Purchase Agreement. The purchasers in this case authorised the respondent to charge the land but the charge must be released prior to the handing over of vacant possession to them;

(2) on the evidence based on the affidavits and the letters the learned judge should have held that there was no extension of the loan in this case;

(3) on an application for sale of the land charged the court has not only to apply the law but also to invoke the aid of equity in order to be satisfied whether a cause to the contrary has been shown or not in accordance with section 256(3) of the National Land Code. The chargee must not only come to court with proof that the chargor has defaulted but also with proof that the chargee himself is free of fault and that he was not guilty of any unreasonable conduct, and that there was no right of innocent third parties to be affected by the order;

(4) in this case the facts showed that the appellant had defaulted its obligation, when it did not make the loan releases despite the fact that the architect's certificates were presented to it. The facts also showed that the appellant was unreasonable in this attitude from the language of the letters which it wrote or were written on its behalf and from its leaving the first respondent's letters unreplied. The purchasers of the building lots had also acquired equities in the land;

(5) the default of the appellant to release the loan would be sufficient to justify the dismissal of the appeal in this case, but when it is coupled with the equity of the purchasers and the appellant's unreasonable conduct and attitude, the court had no hesitation to dismiss the appeal.

Cases referred to:

(1) *Murugappa Chettiar* v. *Letchumanan Chettiar* [1939] M.L.J. 296.
(2) *Public Finance Bhd.* v. *Narayanasamy* [1971] 2 M.L.J. 32, 33.

FEDERAL COURT.

Ong See Seng for the appellant.
W.S.W. Davidson (*S.A. Almeida* with him) for the first respondent.
Hira Singh for the second respondent.
S.A. Lingam for the interveners.

Cur. Adv. Vult.

Salleh Abas C.J. (Malaya) (delivering the Judgment of the Court): This is an appeal from the decision of Wan Hamzah J. in refusing the appellant's Originating Summons applying for an order of sale of the first respondent's land and for allowing the Summons in Chambers by the second respondent and two other persons, viz: Harcharan Singh and Sellapan Narayanan, who all applied for an order to intervene in the appellant's application and be added as respondents thereto.

For the sake of convenience the first respondent will be referred to in this judgment as "the respondent" and the second respondent together with Harcharan Singh and Sellapan Narayanan as "the interveners".

The Facts:

The facts are as follows:

The respondent is a housing developer. At the material time it was developing a housing estate, called Taman Muhibah. The estate consists of 59 building lots (numbered from Lots 13507 – 13565) which are all owned by it. Houses were being built upon these lots for sale to members of the public. Amongst those who bought the houses were the interveners who each purchased a house. The Sale and Purchase Agreements entered into between the respondent and the purchasers in connection with the sale of these houses are all in one standard form; the material provisions being clauses 3 and 4 which are as follows:

"3. Subject to the provisions of Clause 4 hereof, the Purchaser agrees that the Vendor may subject the land sold to the Purchaser to encumbrances at any time after the signing of this agreement.

4. The land sold to the Purchaser shall be free from any encumbrance immediately, prior to the handing over of vacant possession of the building to the Purchaser."

Under clause 10 of the Agreement the house would be completed and ready for occupation by the purchasers within 18 months of the date of the Agreement and under clause 18 upon the issue of certificate of completion by the respondent's architect and provided the purchasers shall have paid the purchase price in full they are entitled to take possession of the houses.

To develop this housing estate the respondent required finance. Clauses 3 and 4 of the Agreement are undoubtedly designed to enable it to raise the necessary finance for the estate; and so it obtained a loan $600,000.00 from the appellant as bridging finance. As a security for the loan the respondent charged all the 59 housing lots to the appellant. The charge was created on January 27, 1979 and registered on February 8, 1979. At the material time most of these lots had already been sold to members of the public. For example, the sale to intervener Bhagat Singh was on November 3, 1978, whilst to another purchaser, whose Sale and Purchase Agreement exhibited in the affidavit of Tan Siew Chin, the appellant's business manager, was signed on December 8, 1978. It is, however, not clear when the other two interveners purchased their lots.

There was no formal loan agreement signed between the parties, but the terms of the loan are contained in a letter dated November 25, 1978 (TSC 27) signed by the appellant and confirmed by the respondent. According to this letter the loan was to be released by stages; the first release of $200,000.00 to be made upon presentation of the charge; and subsequent releases regarding the balance of $400,000.00 to be made progressively upon presentation of the respondent's architect's certificates. The loan was subject to 11% interest per annum which was to be calculated and settled monthly. The repayment was to be from the sale proceeds of the houses and the repayment period was not to exceed two years from the date of the first release.

The high expectation entertained by the purchasers of the successful completion of Taman Muhibah was, however, dashed when the respondent was unable to pay monthly interest in time and delayed interest payments for several months, whereupon the appellant refused to make further loan releases unless interest was paid despite the fact that architect's certificates were presented. Because of financial difficulties, which the respondent attributed to the appellant's failure to honour its loan obligations to make loan releases, the respondent's contractors ceased work and the development of Taman Muhibah was as a result adversely affected.

The first loan release of $200,000.00 was made on February 18, 1979 and interest payments were therefore to begin immediately. But from the word 'go', the respondent had encountered difficulties in making these monthly payments. Interest for the three months of February, March and April, 1979 amounting to $4,245.98 was not paid and by the following July the amount had accumulated to $8,018.00. On September 28, 1979 the respondent paid a sum of $4,557.75 by cheque, but it is not clear whether the whole sum was settled in full. In 1980 the respondent again fell into arrears. The amount due for June and July of that year amounting to $8,944.98 was not paid and this had accumulated through the following months to September to a total sum of $18,554.38.

Because of the respondent's difficulties in making interest payments, the appellant decided to call

off the deal. It sent three demand notices. These are dated August 15, 1980 (TSC 21), September 15, 1980 (TSC 22) and October 27, 1980 (TSC 23). The last demand notice informed the respondent in no uncertain terms that a foreclosure action would be taken if the sum of $18,554.38 was not paid within a week.

The respondent's replies to these notices were that it would make the payment if the appellant would make the loan release.

It appears that on September 19, 1979 the respondent submitted four architect's certificates to the appellant for further release of the loan. The amount involved was $52,405.00 (TSC 30 and MKR 1). No payment was made and despite copies of the certificates having been sent on October 28, 1980 (referred to in TSC 24), the appellant still withheld payment and up to date has not made that payment at all. The stand taken by the appellant which it made known to the respondent as early as July 2, 1979 (TSC 29) was simply that no loan releases would be made unless interest due on the moneys already released was paid, notwithstanding the architect's certificates to the contrary. The respondent on the other hand took the view that interest would be paid after the loan release would be made. Thus the fate of Taman Muhibah and its purchasers hangs upon interest payments which the respondent had to make, but failed to make, and upon the loan release which the appellant had to make but also failed to make. Both parties have taken an uncompromising attitude which eventually led to the present proceeding before Datuk Wan Hamzah J. and finally before us.

The learned Judge's ruling:

In dismissing the appellant's application to foreclose the charge the learned judge held that the charge was unenforceable because clauses 3 and 4 of the Sale and Purchase Agreement did not allow the respondent to create the charge but only such encumbrances as would not place the land in jeopardy of being sold, because otherwise the purchasers would not be entitled to vacant possession free of encumbrances which they were entitled to under the agreement. As an alternative ground the learned judge held that the loan was extended and that being the case the appellant should not be entitled to the foreclosure.

As regards the meaning of clauses 3 and 4 of the Sale and Purchase Agreement and their effect upon the charge, with respect to the learned judge, we found ourselves unable to subscribe to his view. It is to be observed that neither of these clauses specifies the type of encumbrances which the respondent as the vendor could create. And it is clear that whatever encumbrances were created, including the charge, clause 4 imposes an obligation on the respondent to discharge them completely before it would hand over vacant possession of the building to its purchaser. Failure to do so surely could not invalidate the charge, as the appellant as chargee is a complete stranger to the Sale and Purchase Agreement. Such failure only amounts to a breach of contract, to be confined solely to the parties thereto. Even assuming that the learned judge's view that clauses 3 and 4 prohibit the creation of the charge is correct, the charge created in breach of these clauses could not render it invalid, unless fraud is proved; the reason being that the appellant is not a party to the Sale and Purchase Agreement. This is a very elementary principle of the law of contract. We, therefore, accept the submission of counsel for the appellant on this point in that the interveners and other purchasers authorized the respondent to charge the land and that the charge must be released prior to the handing over of the vacant possession to them. We also observed that even counsel for the respondent without making any direct concession thereon admitted his difficulties in understanding the learned judge's reasoning.

Regarding the learned judge's alternative ground, his finding as to the loan being extended was purely based on inferences which he drew from the affidavits of Mr. Kanagaratnam, the chairman and managing director of the respondent, Mr. Yeoh Ah Seng, the respondent's solicitor and Mr. Tan Siew Chin, the appellant's business manager and a letter dated February 13, 1981 written by Mr. Yeoh Ah Seng. It is, however, true that none of these witnesses was cross-examined on this issue although their affidavits were in conflict with one another.

At first we thought of referring this case down for rehearing of oral evidence, but having regard to the time and expenses which would be involved in such reference, we decided to continue with the hearing of the appeal. As the learned judge's finding is based on the affidavits and the letter, we are in as good a position as he was, to make our own finding because we are no longer bound by the advantage which he would have had if oral evidence had been given.

There is no dispute that Mr. Kanagaretnam in the company of Mr. Yeoh Ah Seng met Mr. Tan Siew Chin, on February 10, 1981 at the latter's office in Kuala Lumpur in order to discuss the loan. The necessity of this meeting must be due to the fact that the two year repayment period of the loan would expire on February 18, 1981, which was then only one week away. The witnesses are, however, at variance as to what transpired at the meeting. According to Mr. Kanagaretnam, Mr. Tan Siew Chin agreed to the extension of the loan for a period of six months and he would obtain a formal approval of the appellant's directors if the respondent were to pay $20,000.00 interest within fourteen days, which period the respondent said, was later extended to March 14, 1981; but when the respondent tendered the payment on that date, the appellant refused to accept it. Mr. Tan Siew Chin, however, denied that he ever agreed to the extension. He simply said that Mr. Kanagaretnam "orally agreed to pay $20,000.00 as interest on or before February 18, 1981 and that a further sum of $20,000.00 on or before April 15, 1981". Mr. Yeoh Ah Seng in his affidavit confirmed the splitting of interest payments into two stages, but did not say that the loan was extended on condition that interest was paid in the manner stated by Mr. Kanagaretnam. The letter which he wrote on February 13, 1981, i.e. three days after the meeting clearly shows that the extension of the repayment of the principal and the splitting of interest payment into two stages were nothing more than a mere proposal by the respondent in order to settle the arrears of interest and principal. The letter was not replied, nor was there any evidence to prove that the proposal was accepted. Reproduction of the relevant parts of the letter will make the matter clear.

"We are instructed by Messrs M.K. Ratnam Holdings Sdn. Bhd. of No. 12, Station Road to write to you with reference to the meeting held on the 10th instant between Mr. M.K. Retnam and yourself regarding the settlement of arrears of interest and principal to your company.

"We are instructed to propose to you settlement in the following terms:–

(1) that our clients pay you a sum of $20,000/- towards the arrears of interest and the balance on or before the April 15, 1981.

(2) that the principal sum to be settled in six months' time.

As requested, we enclose herewith a list of the names and addresses of the cash purchasers and those who have obtained loans from the OCBC Ipoh and the Government. Enclosed herewith is also a letter of approval from the Ministry of Housing and Local Government approving the increase."

A fair inference from these affidavits and the letter is this: Whilst Mr. Tan Siew Chin might have agreed to the proposal made by the respondent for the extension of the repayment period of the principal sum and the interest, he must have said to the respondent that he needed to obtain his directors' formal approval and that he would recommend to them to approve the proposal if a sum of $20,000.00 were paid within a fortnight. The request for the names and addresses of cash purchasers stated in the letter supports this inference as the request appears to be for no other purpose than to strengthen the application for the loan extension. We are, therefore, of the view that no extension of the loan was given and that even if it was given, the extension was conditional upon the respondent paying the first part of the interest in time and also upon Mr. Tan Siew Chin obtaining his directors' approval. As the respondent did not pay the sum in time but outside the fourteen day limit, the condition was not fulfilled and the proposal for extension fell to the ground. The allegation by Mr. Kanagaretnam that interest was extended to March 14, 1981 is difficult to accept as it is too much of coincidence with the respondent's attempt to pay the $20,000.00 interest on that date. We are, therefore, compelled to hold that the learned judge should have held that there was no extension of the loan as alleged by the respondent.

Should the appellant be entitled to the appeal?

Now that we disagree with the learned judge's ruling on the above two grounds, we must consider whether we should allow this appeal or not. Counsel for the respondent submitted that we should dismiss the appeal on the following grounds. First, although the respondent defaulted in its interest payment the appellant had, however, committed a greater default by not making the required loan release. Secondly, the appellant's conduct had been very unreasonable as could be seen from the correspondence. Thirdly, the rights of the third parties, i.e. the purchasers, must be considered especially when the appellant well knew of such rights before entering into the loan and charge transactions.

Court's duty:

To deal with this submission we must remind ourselves of the court's duty under subsection (3)

of section 256 of the National Land Code, which is as follows:

"(3) On any such application, the court shall order the sale of the land or lease to which the charge relates unless it is satisfied of the *existence of cause to the contrary.*" (Emphasis is ours)

It is clear that notwithstanding the proof of default by a chargor the chargee is not automatically entitled to an order to sale nor would the court without scrutiny allow his application. The court must decide whether there are circumstances in the case before it which would amount to a "cause to the contrary" within the meaning of subsection (3) which would be sufficient in its opinion to refuse the chargee's application although the charge is lawfully and validly created and the chargor's default is proved.

The provision of subsection (3) is by no means a novel idea as a similar provision was already enacted by section 149 of the former F.M.S. Land Code (Cap.138) although the language used therein is not identical. The relevant part of this section is as follows:

"... it shall be lawful for the chargee by summons to call the proprietor of the charged land before the court to show cause why the land subject to the charge should not be sold by public auction under direction of the Court. *If no cause be shown to the satisfaction of the court*, it shall order the public sale of land to take place ..." (emphasis is ours)

The phrase "cause to the contrary" used by the National Land Code and "cause be shown to the satisfaction of the Court" used by the F.M.S. Land Code, in our view, convey the same meaning and bear the same concept. What then is the meaning of the phrase "cause to the contrary" and how should the court proceed to determine its meaning?

In *Murugappa Chettiar* v. *Letchumanan Chettiar*[1] Aitken J. who sat with McElwaine C.J. (S.S.) and Murray-Aynsley J. to form the F.M.S. Court of Appeal said:

"... Section 149 of the Land Code obviously contemplates that there may be cases in which charged land should not be sold, even though there has been a default in payment of the principal sum or interest thereon secured by the charge; and it seems to me that a chargor may 'shew cause' either in law or equity against an application for an order for sale, and that the Courts should refuse to make an order in every case where it would be unjust to do so. By 'unjust' I mean contrary to those rules of the common law and equity which are in force in the Federated Malay States."

In that case the chargee was a beneficial owner of a half share of the land through his nominee, whilst the other half was owned by the chargor. The whole land was charged by both the nominee and the chargor as a security for a loan. The chargor was prepared to pay half of the loan because he owned only a half share of the land and maintained that the other half of the loan should be borne by the chargee. The Court of Appeal accepted this contention and dismissed the chargee's application for an order of sale. The equity which the chargor proved was in the words of Aitken J. that the chargee cannot shelter himself behind his nominee and evade the plain duty which rests on him, as the beneficial owner of the other undivided half share in the land, of making a contribution towards the payment in full of the principal sum secured by the charge.

In *Public Finance Bhd.* v. *Narayanasamy*[2] Ong C.J. who delivered the judgment of the Federal Court applied the commonsense principle of fairness when he posed the following question in order to dismiss the appellants'/chargees' appeal:

"... can the appellants in all good conscience apply to the court for an order of sale to include property over which the respondent, to their knowledge, has no power of disposal? (p.33)

The facts in that case are similar to those of the present appeal except that there appeared to be no authorization by the purchasers in that case to the chargor to charge the land and that the purchasers had already entered into occupation of the land. The learned trial judge rejected the chargees' application for an order of sale on the ground of fraud on the purchasers and a collusion between the chargor and the chargees. In affirming this decision, the learned Chief Justice held that the charging of the land when it was to the knowledge of the parties the subject of a sale agreement with third parties and the chargees' insistence in the subsequent foreclosure proceedings that the purchasers had no right at all except only to damages for breach of contract against the chargor is so unconscionable as to amount to fraud. In so holding, the learned Chief Justice was obviously troubled by the existence of the right of the third parties which the chargees sought to ignore. This is made clear from the following passage of the judgment:

"They, (the appellants/chargees) nonetheless, by virtue of the charge, agreed with the respondent to ride roughshod over all the sub-purchasers, should the need arise to enforce the security."

In our view, that case should be clearer if we look at it from the view of "sufficient cause" or "cause to the contrary" with which the court has to be satisfied under subsection (3) of section 256 of the National Land Code, the equity in the case being the right of the third parties. It is unfortunate, however, that this issue did not appear to have been canvassed before the court.

From the review of the above cases, we are of the opinion that the court has not only to apply the law but also invoke the aid of equity in order to be satisfied as to whether "a cause to the contrary" has been shown or not. The chargee must not only come to court with proof that the chargor has defaulted but also with proof that the chargee himself is free of fault and that he was not guilty of any unreasonable conduct, and that there was no right of "innocent third parties" to be affected by the order.

Respondent's case:

We need now to consider the respondent's counsel's submission.

(a) *Appellant's own default:*

We accept the submission that the appellant had defaulted its obligation, when it did not make the loan release despite the fact that architect's certificates were presented to it. Its insistence that release would be made only after the arrears of interest were settled is not tenable because there is nothing in the terms of the loan (TSC 27) which requires the release to be made conditional upon interest payment. The action of the appellant in withholding the loan release may well be moved by a consideration to preserve its own position, but this can never be justified if it in turn leads to a breach of its obligations.

(b) *Unreasonable conduct of the appellant:*

This could be shown not only from the language of the letters which it wrote or were written on its behalf, but also by its attitude in purposely leaving the respondent's letters unreplied, indicating that it was solely interested in collecting interest due on the loan and that as the respondent was unable to make the payment there was nothing else to write about. For example, the letter of February 13, 1981 (MKR 1) by the respondent's solicitor regarding the proposal to settle the loan and its interest went unanswered. Another example is a letter dated March 26, 1981 written by the same solicitor after the appellant had refused payment of $20,000.00 as interest on March 14, 1981 pleading with the appellant not to proceed with the foreclosure proceedings because of the existence of third party right also went unresponded.

On September 19, 1979 (TSC 30) the respondent forwarded four architect's certificates to the value of $54,405.00 in favour of payment. The appellant did not reply to this letter. The respondent's solicitor wrote again on December 16, 1980 (TSC 24) requesting the loan release. In this letter the solicitor stated that the respondent had sent copies of the certificates on October 28, 1980 because the appellant had informed the respondent that it had misplaced the certificates. The reply that came from the appellant's solicitor on January 21, 1981 (TSC 25) was unbelievably couched in an arrogant language and appeared to be completely over-reactive. The letter charged the respondent with creating a red herring as regards the allegation of misplacement of the certificates. Whether the certificates were misplaced or not is irrelevant. The respondent was probably trying to be helpful and polite. But to be chided with creating a red herring is more than what is bargained for and the expression "red herring" is as crude as it is hardly worthy of use by a member of this learned profession in his written work. The appellant's conduct, however, appeared to be all the more unreasonable because that "red herring" letter was in fact its last letter to the respondent as the appellant kept a complete wall of silence until it sent down like a thunderbolt from the sky a default notice under section 254 of the National Land Code, although in the meantime all letters written by the respondent went unreplied and unattended.

(c) *Rights of bona fide purchasers:*

The loan negotiation took place several months and this was confirmed by the affidavit of Mr. Chong Tet Nam who was the appellant's business executive director at the relevant time. In any case the letters at pages 64 and 67 of the Record show that the respondent sent a formal application on October 14, 1978 and the reply from the appellant on October 31, 1978 was that it required amongst other things, "a list of all purchasers" and that the list was supplied to the appellant on November 4, 1978. It also appears that in addition to the list, the appellant also obtained copies of

the Sale and Purchase Agreement. This is proved by the fact that a copy of the Agreement (TSC 1 at page 100 of the Record) was produced as an exhibit attached to Mr. Tan Siew Chin's affidavits. It is thus clear that at the time of the loan and charge transactions the appellant not only knew that the land to be charged for the loan was parcelled into several housing lots and sold to various purchasers, but it also had knowledge of the contents of the Sale and Purchase Agreement itself, although it might not know the purchasers personally or individually. However, even the terms of the loan was that its repayment was to come "from the proceeds of sale of the houses built". This term clearly shows that the appellant's decision to grant the loan was based on its assessment of the economic and commercial viability of the respondent's housing estate and its expectation of making gains from the proceeds of sale to the purchasers. Having supplied the capital in the form of loan with a sure expectation of profit in the form of interest, in essence the appellant could very well be likened to being in partnership with the respondent, although as a matter of law this transaction was kept only as a simple loan secured by the charge.

Now, that the respondent has failed to pay the interest and is unable to repay the capital, should the appellant be allowed to pull out from the deal, leaving innocent purchasers in the lurch? Should the appellant be allowed to pursue its narrow interest in the preservation of its loan and interest due on it when it was in a way a willing party to the project by lending the money to the respondent, regardless of its social and moral responsibilities and the purchasers' equities? We have no doubt that these purchasers have acquired equities and could specifically enforce their Sale and Purchase Agreement against the respondent, but for the charge which they were naive enough to authorize the respondent to create. In our view, the appellant should have foreseen this event – i.e. the inabilities of the respondent to honour its bargain – at the time when it decided to give the bridging loan. However, moved by its business consideration of the possibility and probability of making a good return from its investment by way of interest it decided to give the loan. In our view, if the appellant wants to be cautious, it should be cautious at that time, and not now, after the event.

It is in order to enable the court to do justice in situations such as this that the legislature thought fit to enact subsection (3) of section 256 of the National Land Code in that no order of sale would be allowed if the court is satisfied with the existence of "a cause to the contrary". We think that the default of the appellant to release the loan alone would be sufficient to dismiss its appeal, but when it is coupled with the equity of the purchasers and the appellant's own unreasonable conduct and attitude, we have no hesitation to dismiss this appeal altogether.

In its notice and petition of appeal, the appellant also appealed against the order of the learned judge to allow the interveners to be parties to the proceedings. But its counsel did not address us on the propriety or correctness of the learned judge's ruling on this point. We therefore take it that the appellant abandoned that issue.

In conclusion, we hold that the appeal is dismissed with costs, and that the deposit should be paid to the respondent on account of the taxed costs.

Appeal dismissed.

Solicitors: *Mah-Kok & Din; Almeida & Co.; Asbir & Hira Singh; S.A. Lingam & Co.*

PEMUNGUT HASIL TANAH, DAERAH BARAT DAYA (BALIK PULAU), PULAU PINANG v. KAM GIN PAIK & ORS.

[F.C. (Abdul Hamid, Mohamed Azmi & Hashim Yeop A. Sani F.JJ.) July 18 & September 7, 1983]

[Ipoh – Federal Court Civil Appeal No. 115 of 1983]

Land Law – Land Acquisition – Application to quash award of Collector – Allegation that owners were not given opportunity to be heard – Long delay between issue of notice and making of award – Abuse of power – Award of Collector quashed – No jurisdiction to quash notice of acquisition or to order possession of land to be returned to owners – Government Proceedings Ordinance, 1956, s. 29(1)(b) – Land Acquisition Act, 1960, ss. 10, 12 & 68.

Administrative Law – Certiorari – Application to quash award of Collector of Land Revenue in land acquisition proceedings – Long delay between notice of acquisition and making of award – Government Proceedings Ordinance, 1956, s. 29(1)(b) – Land Acquisition Act, 1960, ss. 10, 12 & 68.

In this case the respondents had applied for an order of certiorari to quash the award made by the appellant in